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BY HAND

The Honorable William E. Kennard
Chairman
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20024

Re: In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee.
CC Dkt. No. 98-141

Dear Chairman Kennard:

On behalf of the Alarm Industry Communications Committee, I am writing to express grave concern that the Commission is about to attempt action unprecedented in the agency's 65 year history: allowing a regulated company to escape clear statutory restrictions merely by the device of acquiring another company with a lesser restriction. The recently released third revised set of conditions on the SBC-Ameritech merger would – by their failure to require divestiture of the Ameritech alarm monitoring businesses – seek to accomplish just this result.[1] Such action would be not only unprecedented, it also would be patently unlawful.

[1] Letter from Paul K. Mancini, SBC and Richard Hetke, Ameritech to Magalie Roman Salas, FCC, Sept. 17, 1999. SBC and Ameritech's proposed merger conditions make no reference to alarm monitoring or the divestiture required by Section 275 of the Act.

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Section 275(a)(1) of the Communications Act is one simple sentence which bars SBC from any affiliation with alarming monitoring entities until February 8, 2001.[2] The FCC itself has ruled that this prohibition precludes SBC even from reselling alarm monitoring services or having a financial interest in such activities.[3] It is beyond doubt then that this Congressionally-enacted statute would bar SBC from a direct purchase of Ameritech's alarm monitoring interests because it would create an unlawful affiliation with SBC's Bell Operating Companies – PacTel and SWBT.

It is equally beyond doubt that SBC's merger with Ameritech will create the same type of unlawful affiliation between SBC's Bell Operating Companies – SWBT and PacTel – and the Ameritech alarm monitoring subsidiary. Without divestiture, after the merger SBC's operating companies will indisputably and unequivocally have an affiliation with an alarm monitoring entity, in direct contravention of the plain language of Section 275(a)(1) and the Commission's own prior rulings.

The only response to this unlawfulness offered by SBC and Ameritech is that Sections 275(a)(1) and (a)(2) supposedly appear to be in conflict. Under this flawed contention, preservation of Ameritech's "grandfather" exception in (a)(2) is said to take equal precedence with SBC's prohibition in (a)(1).[4] Which provision should prevail thus is argued to be hidden in the supposed vagueness of the Congressionally chosen language. This is utter nonsense.

First, in its prior 65 years the FCC has never had difficulty determining the proper outcome in such situations. If one company was subject to a legal restriction and it merged with

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2 Section 275(a)(1) reads: "No Bell operating company or affiliate thereof shall engage in the provision of alarm monitoring services before the date which is five (5) years after the date of enactment of the Telecommunications Act of 1996."

3 *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 12 FCC Rcd 3824, 3840-42 (1997) (*Alarm Monitoring Order*). The FCC ruled that SBC may not (i) own or operate an alarm monitoring service entity, (ii) obtain more than a 10% equity interest in such an entity, (iii) resell alarm monitoring services, (iv) "intertwine its interests" with that of an alarm monitoring entity or (v) obtain a "financial stake in the commercial success" of such an entity. *Id.*

4 Ameritech has argued that SBC becomes a "successor or assign" to the Ameritech BOCs' grandfathering, and apparently has informally contended this creates a "conflict" between Section 275(a)(1) and (a)(2). However, this argument misses the mark, for nothing in SBC's purchase of Ameritech can expand the terms of Section 275(a)(2) beyond the five Ameritech BOCs to encompass PacTel and SWBT, which clearly are – and continue to be – governed by Section 275(a)(1).

another company, the new entity came under the restriction.[5] There are literally scores of Commission rulings of this sort, even as recently as 1999. For example, there is no apparent concern whether the merged Bell Atlantic-GTE would be subject to Bell Atlantic's Section 271 restriction. The answer is so obvious that the question answers itself. Even in the SBC-Ameritech merger, divestiture of overlapping cellular properties is taken as a given. That the restraints of Section 275 should be the first Communications Act provision in 65 years to be treated differently defies all logic.

Second, there is no lack of clarity in Ameritech's grandfathering clause. It applies to specific "Bell Operating Companies" possessing certain characteristics. The Commission has previously ruled that this language refers to the five Ameritech operating companies – and *only* those five companies.[6] The provision has "no applicability" to the other BOCs, including PacTel and SWBT.[7] Approving an affiliation between PacTel, SWBT and the alarm monitoring subsidiary of Ameritech is directly contradictory of this FCC ruling.

Third, the Congressional policy in Section 275 is not difficult to discern. The intent was to create a five year bar on Bell Operating Company entry into alarm monitoring. In order to avoid forcing Ameritech to divest its existing business, Section 275(a)(2) was enacted as a narrow exception to that ban. Even that exception was limited to internal growth, rather than growth by acquisition, as the Commission has already ruled. The situation grandfathered by Congress thus was the five specific Ameritech BOCs with 25 million access lines affiliated with an alarm monitoring entity with approximately 350,000 customers. Since enactment, however, Ameritech has tripled the size of its alarm monitoring operation – to over one million

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5 *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc., Transferee*, 14 Comm. Reg. (P&F) 24, FCC 98-276, ¶ 37 (Oct. 23, 1998) (describing divestiture by SNET to comply with SBC in-region interLATA restrictions).

6 *Alarm Monitoring Order* at 3839.

7 *Id.* at 3843.

customers – through unlawful acquisitions.[8] And after its merger with SBC the affiliates will have over 72 million access lines – over one-third of the United States. It is impossible to read Section 275 and believe this outcome is consistent with Congressional intent.

Finally, the equities of the situation – the "public interest" – should not be overlooked. In the three and one-half years since Section 275 was enacted, Ameritech has unlawfully purchased nearly $1 billion in competing alarm companies, despite being warned by the U.S. Court of Appeals in July, 1997 that it made such purchases at risk of future divestiture orders.[9] Today, in September 1999, with only one and one-half years remaining on its restriction, Ameritech continues to enjoy the fruits of its unlawful actions. And now it has chosen, for its own self-interested reasons, to merge with SBC despite knowing that SBC is barred from affiliation with alarm monitoring entities by statute and by prior FCC ruling. In the face of these facts, Ameritech cannot claim victim status or unfair treatment. It is the alarm industry, whom Ameritech has forced to struggle non-stop simply to preserve the legislative compromise which Ameritech accepted in 1996 and then sought strenuously to escape ever since, who has been victimized.

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8 Following a ruling of the U.S. Court of Appeals, the Commission found four of these acquisitions to be unlawful and ordered Ameritech to show cause why it should not be ordered to divest. *See Enforcement of Section 275(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Against Ameritech Corporation*, Memorandum Opinion and Order on Remand and Order to Show Cause, FCC 98-226 (rel. Sept. 25, 1998), ¶ 1 ("*Second Show Cause Order*"); *Enforcement of Section 275(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Against Ameritech Corporation*, Memorandum Opinion and Order and Order to show Cause, FCC 98-148 (rel. July 8, 1998), ¶ 1 ("*First Show Cause Order*"). Over one year has since passed with no further FCC action – and Ameritech still operating its unlawful acquisitions. Further, an AICC petition against another unlawful Ameritech acquisition has been pending before the Commission for over two years without FCC action. *See* Fourth Emergency Motion of the Alarm Industry Communications Committee for Orders to Show Cause and to Cease and Desist, CCBPol 97-11 (filed Oct. 8, 1997). Ameritech thus has been allowed to retain its unlawful acquisitions for over two years and counting. Without prompt action, the SBC-Ameritech merger will permit a vast further expansion of the scope of the Commission's failure to enforce Section 275, even after the Court of Appeals ruling.

9 Order, *AICC v. FCC*, No. 97-1218 (D.C. Cir. July 30, 1997) ("Ameritech is cautioned, however, that acquisitions of the assets of unaffiliated alarm monitoring service entities *that it has made already and any additional purchases* could result in a divestiture order if the FCC's interpretation of [Section 275] is not sustained") (emphasis added).

The law is clear, Congressional policy is clear, prior FCC rulings are clear, the equities are clear. If Ameritech is to merge with SBC, it must first divest its alarm monitoring interests.

Sincerely,

Danny E. Adams
Counsel to the Alarm Industry Communications Committee

DEA/ae

cc: Commissioner Susan Ness
Commissioner Gloria Tristani
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
General Counsel Christopher J. Wright
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